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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID BALDUS PHILLIPS,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:09-CV-00377-RCJ-(VPC)

ORDER

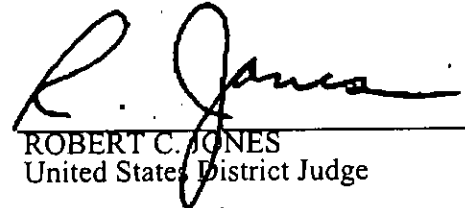
The court determined that petitioner had not exhausted his available state-court remedies for all of his grounds for relief. Order (#37). The court then denied reconsideration of its determination. Order (#42). The court directed petitioner to declare what he wanted to do with the unexhausted ground 4 of his petition (#9): (1) inform this court in a sworn declaration that he wishes to dismiss ground 4 of his petition (#9), and proceed only on the remaining grounds for relief, (2) inform this court in a sworn declaration that he wishes to dismiss his petition (#9) to return to state court to exhaust his state remedies with respect to the claims set out in ground 4 of his petition (#9), or (3) move to stay this action while he returns to state court to exhaust his state remedies with respect to the claims set out in ground 4 of his petition (#9). The court also told petitioner that if he did not inform the court of his decision, then the court would dismiss the action. Petitioner has submitted a motion to dismiss (#40), and respondents have submitted a response (#41). Petitioner asks to dismiss this action and any pending motions. Respondents correctly note that petitioner has not given a sworn declaration that he wishes to dismiss this action. However, if the court were to consider the motion to dismiss (#40) to be non-responsive to the court's direction,

1 then the result would be no different than if petitioner had followed directions. Either way, the
2 court will dismiss this action.

3 Respondents ask the court to dismiss the action without prejudice. That is not the
4 correct action to take when the petition is mixed, containing exhausted and unexhausted grounds.
5 The court will dismiss the action without prejudice. That will give petitioner the opportunity to
6 return to this court if he exhausts his available remedies in state court, but it will not affect other
7 procedural defenses, such as timeliness and procedural default.

8 IT IS THEREFORE ORDERED that petitioner's motion to dismiss (#40) is
9 **GRANTED**. This action is **DISMISSED** without prejudice for petitioner's failure to exhaust his
10 available state-court remedies. The clerk of the court shall enter judgment accordingly.

11 Dated: February 25, 2011

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14 ROBERT C. JONES
United States District Judge
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